83-492

No.

In the Supreme Court of the United States

October Term, 1983

MOBILE HOME ESTATES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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September 21, 1983

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QUESTIONS PRESENTED

1. Should an employer who asserts a good-faith doubt of an incumbent labor union's continuing majority status after expiration of a collective bargaining agreement be required to prove only the several, interrelated factors supporting that doubt, or must it prove that the union, in fact, has lost its majority status?

2. Should a seven-year delay caused by National Labor Relations Board procedural irregularities and a one hundred per cent turnover in the unit of affected employees preclude the enforcement of a National Labor Relations Board order requiring an employer to bargain with an incumbent union whose majority status was challenged?

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Petitioner, Mobile Home Estates, Inc.,[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 24, 1983.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit, which was entered in this matter on May 24, 1983, is styled, *National Labor Relations Board v. Mobile Home Estates, Inc.*, and is officially reported at 707 F.2d 264 (6th Cir. 1983). It appears at App. A1.

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1. All of the parties to this petition are listed in the caption. Mini Mansions, Inc. is an affiliate of the petitioner, Mobile Home Estates, Inc.

The Decision and Order of the National Labor Relations Board is reported at 259 N.L.R.B. 1384, 109 L.R.R.M. (BNA) 1123, 81-2 NLRB Dec. (CCH) ¶ 18,704 (1982). It appears at App. A4.

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 24, 1983. No petition for rehearing, or for further hearing before the full Court, has been filed.

An order signed by Justice William J. Brennan, Jr. on August 15, 1983 extended to September 21, 1983 the time to file a petition for a writ of certiorari. This petition was filed on or before that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. §§ 151-69, are set forth below:

> Sec. 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor or-

ganization as a condition of employment as authorized in section 158(a)(3) of this title." 29 U.S.C. § 157.

Sec. 8. "(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(1) and (a)(5).

STATEMENT OF THE CASE

Statement of Facts

In March, 1972, Petitioner, Mobile Home Estates, Inc. ("Mobile Home"), voluntarily agreed to recognize Local 712, International Union, Allied Industrial Workers, AFL-CIO ("Union") as the exclusive bargaining representative of its production and maintenance employees. No representation election was held among those employees to conclusively determine their preferences as to a collective bargaining representative. Between voluntary recognition and the events in issue here, there was a 100% turnover in Mobile Home's work force.

In November, 1973, Mobile Home and the Union entered into a collective bargaining agreement covering such employees, effective from November 13, 1973 through November 14, 1976. By the end of 1976, only two of some 40 employees had also been employed at the time the col-

lective bargaining agreement was reached in November, 1973.

During the first year and a half of the collective bargaining agreement, no dues were paid to the Union by the employees despite a union shop provision in the agreement. Authorizations for check-off of the dues payments were finally provided to Mobile Home in June, 1975. At the same time, there was insufficient union interest among the employees to establish their own local union.

In the summer of 1976, a few months before expiration of the agreement and just before commencement of negotiations for a renewal agreement, the Union generated sufficient interest, at least temporarily, to establish a local union for Mobile Home employees. Even then, attendance at the 1976 Union meetings was at best minimal, averaging fewer than 16 employees at six meetings from April through September, 1976, even though this was Mobile Home's peak summer employment period when the number of production and maintenance employees ranged as high as 70 to 80.

In October and early November, 1976, Mobile Home and the Union engaged in a series of five collective bargaining sessions seeking a renewal agreement of the one due to expire on November 14, 1976. During the negotiations, the Union president resigned his position and was succeeded by a vice president who had been in Mobile Home's employ only since May of that year. On November 12, 1976, the Company presented its final contract offer. The Union membership rejected that offer and scheduled a strike to begin five days later, informing Mobile Home on November 14, 1976 of that intent.

The strike commenced shortly after midnight on November 19-20, 1976. At the time of the strike, only 14 of

more than 40 employees had at least six months of service with Mobile Home, almost all of whom ignored the picket lines and worked during the strike. The strike lasted through December 1, 1976, a period of only seven work days (exclusive of Thanksgiving), ending as a result of a meeting of about a dozen employees that evening. As one bargaining committee member said: "We felt we were losing our strength."

No negotiating meetings were requested or held between the "final offer" meeting of November 12 and the termination of the strike on December 1. No Union membership meetings were scheduled or held after December 1, 1976, despite the fact that the Union's secretary, whose job included posting meeting notices, was employed continuously following the termination of the strike.

Following the Union's November 14 strike notice, most, if not all, high seniority employees executed a document ("petition") stating that they did not wish to be represented by the Union. Prior to commencement of the strike, four of seven local Union officers resigned from their Union office, and three of the four also signed the "petition," along with ten fellow employees. Mobile Home President Newman found the "petition" in his mailbox before receiving a letter from the Union requesting resumption of negotiations.

With full knowledge of the Union's history (recounted above), and following an apathetic (nine pickets), abbreviated (seven work days), and unsuccessful strike, during which almost all employees with six months or more seniority worked, most actually resigning from the Union, Mobile Home refused to provide information and to meet with the Union when so requested by letter of December 10, 1976. Mobile Home properly had serious doubt as to

whether the Union had majority support among its employees. At no point during these proceedings did the General Counsel prove, or offer or attempt to prove, that the Union did, in fact, enjoy majority support on December 10, 1976.

Proceedings Below

With the withdrawal of recognition from the Union in December, 1976, Mobile Home set off on a tortuous expedition through the Board's tangled procedural jungle—an expedition that has now led, some seven years later, to an order that it bargain with a Union that was largely repudiated by its employees at the outset of the expedition. The long delay, attributable to procedural aberrations on the Board's part, has produced a situation in which there has been a 100% turnover in Mobile Home's work force since the Union was voluntarily recognized.

The procedural history of the case can be simply described. The matter was heard before the first administrative law judge on six days in May and June, 1977. More than a year passed before he issued a woefully insufficient decision on September 29, 1978. (App. A101.) Exceptions to this decision were filed on both sides, largely attacking its incompleteness in making credibility resolutions and specific findings of fact. Nearly a year later, on July 12, 1979, the Board issued an order remanding the case to the administrative law judge for completion. (App. A97.)

On February 25, 1980, the Board advised the parties that the first administrative law judge had retired without completing his decision in accordance with the Board's order. (App. A95.) A second administrative law judge was appointed to reconsider the evidence and issue a decision.

A year passed before his decision was issued on March 16, 1981. It was, for the most part, in Mobile Home's favor. (App. A13.)

Exceptions again were filed by both parties. Finally, on February 4, 1982, more than five years after the events in issue, the Board issued a complete and final Decision and Order. (App. A4.)

Subsequently, the Board petitioned the United States Court of Appeals for the Sixth Circuit for enforcement of its order. The Sixth Circuit, on May 24, 1983, refused to enforce the Board's order that Mobile Home had committed an unfair labor practice by refusing to reinstate two economic strikers. On the issue of the withdrawal of recognition by Mobile Home, the court of appeals perfunctorily affirmed the Board's order—the only indication of its rationale being that the "decision of the administrative law judge in this case [as affirmed by the Board] reflects a thorough and conscientious canvassing of the record." (App. A3.)

The case now stands before this Court nearly seven years after the withdrawal of recognition of the Union, during which time there have been wholesale changes in Mobile Home's work force. The only delays of any sort attributable to Mobile Home stem from its pursuit of valid appeals that were substantially upheld. The many avoidable and unnecessary delays are attributable to the Board's fumbling adjudication of the case.

REASONS FOR GRANTING THE WRIT

1. The Federal Courts of Appeals Are in Hopeless and Confusing Disarray As to the Circumstances in Which An Employer May Lawfully Withdraw Recognition From an Incumbent Union

a. Introduction

Section 8(a)(5) of the Act requires an employer to bargain in good faith exclusively with a union representing a majority of its employees. However, under some circumstances, an employer can refuse to bargain with a previously-selected union on the basis that it no longer has the support of a majority of the employees in the appropriate bargaining unit.

During the term of a collective bargaining agreement, an employer is bound by an irrebuttable presumption that the signatory union has majority support. A refusal by the employer to recognize and bargain with the union during this period of conclusive majority status is a per se violation of Section 8(a)(5). *See Precision Striping, Inc.*, 245 N.L.R.B. 169 (1979), *enforcement denied*, 642 F.2d 1144 (9th Cir. 1981).

After the agreement expires, the presumption that the union enjoys majority status continues, but becomes rebuttable. The employer can rebut the presumption and withdraw recognition from the union by establishing *either* that the union no longer commands majority support *or* that the employer in good faith has reasonable grounds based upon objective considerations to doubt the union's continued majority status. *Brooks v. NLRB*, 348 U.S. 96, 103-04 (1954); *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805 (2nd Cir. 1978); *Terrell Machine Co. v. NLRB*, 427 F.2d 1088 (4th Cir. 1970).

The circuits are sharply divided as to the standards an employer must meet in order lawfully to withdraw recognition on the basis of a good-faith, objectively-based doubt of the union's continued majority support. The Ninth Circuit and the Sixth Circuit in essence require the employer to prove that a majority of the employees do not support the union. The Fifth, Seventh and Eighth Circuits, on the other hand, require that the employer make a lesser showing of the objective factors, which, taken together, support a good-faith doubt as to the union's continued majority status, even though those factors, in sum or individually, do not conclusively establish the union's loss of majority support. After such a showing, the burden shifts to the General Counsel and the charging party, the incumbent union, to prove that the union did represent a majority of unit employees to support a finding of a violation of Section 8(a)(5) of the Act.

This clear dichotomy in approach among the circuits requires this Court to intervene and formulate a single standard to be applied in withdrawal of recognition situations. Otherwise, inconsistent application of fundamental labor law policies assuring employees freedom of choice in selecting their bargaining representatives will persist, and enforcement of the Act will continue to be determined *not* by the mandates of the law and its underlying objectives, but rather by the geographical location of the allegedly offending employer.

b. The Sixth and Ninth Circuits

In the proceedings below, the administrative law judge, whose opinion was adopted virtually *in toto* by the Board and the Sixth Circuit, was presented with evidence of several objective factors that gave rise to a good-faith doubt on the part of the employer as to the Union's

continued majority support. Some of those factors emphasized the lackluster support the Union had received among Mobile Home's employees in the years prior to the strike: (1) the Union was *voluntarily* recognized without an election in February, 1972; (2) the Union failed to obtain a collective bargaining agreement until nearly two years later in November, 1973; (3) although the agreement contained a dues check-off provision, no authorizations for dues check-offs were provided to the employer until June, 1975; (4) interest in the Union among the employees was insufficient to support establishment of a local union until 1976, at which time substantially less than a majority of the unit employees attended meetings establishing the Union; (5) even after establishment of the local Union, Union officers had to be appointed, rather than elected, because of lack of interest among unit employees.

Although the aforementioned factors admittedly do not alone establish a doubt as to the majority status of the Union, those factors do shed some light on the depth of the Union's support among unit employees in 1976. They are certainly relevant in determining whether, coupled with other more directly probative factors, Mobile Home rightly began in late 1976 to entertain a serious doubt as to the employees' support for the Union. Several cases have recognized the importance of such evidence.[2] Nonetheless, the administrative law judge, with the concurrence of the Sixth Circuit, refused to consider these factors,

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2. *See NLRB v. Triplett Corp.*, 619 F.2d 586, 587 (6th Cir. 1980); *Bellwood General Hospital, Inc. v. NLRB*, 627 F.2d 98, 104 (7th Cir. 1980); *Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77 (9th Cir. 1977); *National Cash Register Co. v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974); *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 546 (7th Cir. 1970); *NLRB v. Laystrom Manufacturing Co.*, 359 F.2d 799, 800 (7th Cir. 1966); *Hirsch v. Pick-Mt. Laurel Corp.*, 436 F. Supp. 1342, 1357 (D.N.J. 1977).

cavalierly observing that "they really have nothing to do with the majority status of the Union." (App. A76.)

The administrative law judge also refused to consider several events occurring after commencement of the strike as having any bearing upon the majority status of the Union. He accorded no weight to the following factors: (1) four of seven local Union officers resigned from office before the strike; (2) about one-third of the unit employees, including most long-term employees, worked during the entire strike; (3) the strike continued for only seven work days and was actively supported by only a handful of employees; and (4) the strike abruptly terminated without any concessions from the employer and with an admission by a member of the Union's negotiating committee that it simply died for lack of employee support.

In rejecting these factors, the administrative law judge regurgitated traditional Board theory that lack of support for or opposition to a strike among bargaining unit employees or the failure of the strike itself, considered in isolation, do not justify a withdrawal of recognition from the incumbent union. Indeed, if these factors are considered separately and in isolation, disregarding the other factors that go before and follow them, it follows that none alone gives rise to an objectively-based, good-faith doubt as to the majority status of the incumbent union. Other cases have, though, properly recognized that the failure of an incumbent union to win support among bargaining unit employees for a strike call may very well, when considered in conjunction with other events, serve as part of the objective basis supporting an employer's withdrawal of recognition.[3]

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3. *See Bellwood General Hospital, Inc. v. NLRB*, 627 F.2d 98, 104 (7th Cir. 1980); *National Car Rental System, Inc. v. NLRB*, 594 F.2d 1203 (8th Cir. 1979); *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720, 728 (5th Cir. 1978).

After dismissing the foregoing factors as being in no way relevant to the majority status of the Union, the administrative law judge proceeded to dispatch the notion that the 100% turnover in the employer's work force since the voluntary recognition of the Union in 1972 could be considered. While it stands to reason that substantial turnover in the employer's work force in the period since recognition of the incumbent union may properly be considered in determining whether the union has continued to enjoy majority status,[4] the Board has insistently refused to consider such evidence. Instead, the Board has steadfastly adhered to its ancillary presumption that new employees support the incumbent union in the same proportions as did the former employees who originally chose the union as their bargaining representative.

Again, by evaluating evidence of substantial employee turnover in strict isolation without regard to other factors that indicate that newly-hired employees may not support the incumbent union to the same degree as their predecessors, the administrative law judge refused to consider the cumulative weight of all factors in determining whether the employer had an objective basis to doubt the Union's majority support among employees. Instead, the administrative law judge employed the artifice of considering, and then rejecting, each relevant factor on a one-by-one basis.

The final piece of evidence proffered to the administrative law judge was that approximately one-third of the bargaining unit employees, including a majority of the

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4. *See National Cash Register Co. v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974); *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 547 (7th Cir. 1970).

Union's negotiating committee and virtually all long-term employees, signed a "petition" resigning from the Union prior to commencement of the strike. Such "petitions" signed by even smaller percentages of the bargaining unit have routinely been accorded substantial weight in supporting an employer's claimed doubt as to the majority status of an incumbent union.[5] The administrative law judge, however, training his scrutiny solely upon the four corners of the "petition" without regard to other events, concluded that the overt resignation from the Union of one-third of the bargaining unit was of no relevance in assessing whether Mobile Home had cause to doubt the Union's majority support. Incredibly, the administrative law judge observed that the "petition" supported the General Counsel's position, creating yet another presumption that those employees who did not sign the "petition" were presumed to still have supported the Union, with the result that it was "mathematically clear that the Union represented a majority of the employees." (App. A77.)

The administrative law judge's treatment of the resignation "petition" is indicative of the true standard applied by him in evaluating whether Mobile Home had committed an unfair labor practice in withdrawing recognition from the Union—a standard ultimately adopted by the Sixth Circuit. That standard was that Mobile Home was required to bear the burden of proving that the Union did *not* represent a majority of the unit employees. After considering and rejecting in consecutive order the objective bases offered by Mobile Home, the administrative

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5. *See NLRB v. Triplett Corp.*, 619 F.2d 586, 587 (6th Cir. 1980) (resignation by one-sixth of employees in unit); *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720, 728 (5th Cir. 1978) (resignation by 19 of 177 unit employees); *National Cash Register Co. v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974) (resignation by 47 of 222 unit employees).

law judge finally concluded that "under Board precepts Respondent has produced no credible evidence to demonstrate other than what the Union continued to represent a majority of Respondent's employees." [*Sic.*] The administrative law judge went on to observe that "[o]n this basis, it is clear that Respondent violated Sections 8(a)(5) and (1) of the Act." (App. A79.)

Stripped to its essentials, the rationale of the administrative law judge, the Board and the Sixth Circuit is that, in order to justify withdrawal of recognition from an incumbent union, an employer must prove, by a preponderance of the evidence, that the union has lost majority support among unit employees. *A fortiori,* the employer is *not* justified in withdrawing recognition from an incumbent union even when several, objective, interrelated factors strongly suggest that the employer has a sound basis for its good-faith doubt.

The rationale adopted by the Sixth Circuit in this and other[6] cases tracks the reasoning of the Ninth Circuit in *NLRB v. Tahoe Nugget, Inc.,* 584 F.2d 293 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979), cited with approval in *Cain's Generator and Armature Co. v. NLRB,* 628 F.2d 933, 934 (6th Cir. 1980). In that case, the employer based its claim of good-faith doubt on employee statements of discontent with the union, a high employee turnover rate, lack of union activity in processing grievances, a low rate of union membership, union financial difficulties, and union admissions of lack of membership. The Ninth Circuit, employing the same analysis utilized by the administrative law judge in this case, separately considered each factor, and concluded that "[n]one of

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6. *See Cain's Generator and Armature Co. v. NLRB,* 628 F.2d 933 (6th Cir. 1980); *NLRB v. Washington Manor, Inc.,* 519 F.2d 750 (6th Cir. 1975).

the evidence is wholly referrable to a decline in Union support within the relevant units." 584 F.2d at 308.

Several of the factors proffered by the employer were discounted by the Ninth Circuit on the basis of various presumptions fashioned by the Board. For example, the court rejected evidence of high employee turnover by employing the presumption that new employees support the union in the same ratio as the employees they replace. Unable to find any single factor that conclusively demonstrated that the union had lost majority support, the court held that the employer had failed to carry its burden, and had violated Sections 8(a)(1) and (5) of the Act by withdrawing recognition from the union.

It has been recognized that, for all practical purposes, the Ninth Circuit's holding in *Tahoe Nugget* requires the employer to establish that the union has lost majority support among unit employees as a prerequisite to the employer's withdrawal of recognition from the union, and that other evidence demonstrating a good-faith doubt as to the union's majority status, no matter how substantial, is insufficient:

> "The *Tahoe Nugget* court apparently expected the employer to prove the union's actual loss of majority status, not merely its own good-faith doubt. All of the evidence the court considered, both individually and cumulatively, may have been only marginally probative of actual loss of support. The evidence did, however, have more probative value on the issue of good-faith doubt. If the court had used the employer's evidence to decide only this issue, the cumulative weight of all the evidence would have been substantial. It is certainly possible that the employer in *Tahoe Nugget* reasonably and in good faith doubted that the union had majority support. The *Tahoe Nugget* court

> and the Board opted for the *Celanese* approach, however, interpreting the good-faith-doubt test to require the employer to disprove actual majority status." Comment. *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 DUKE L.J. 718, 727-28 (No. 4 1981).[7]

Although the Ninth Circuit in *Tahoe Nugget* speaks in terms of the employer establishing its good-faith doubt about the majority status of the union, it proceeds to reject, seriatim, all the traditional factors advanced by employers as a basis for a good-faith doubt, either by rejecting the particular factors as being irrevelant, or, when relevant, by rebutting the factor with one of the ancillary presumptions fashioned by the Board. In the end, the only evidence that will suffice is for the employer to prove that the incumbent union has, in fact, lost majority support among unit employees. *See id.* at 734-35.

Indeed, in subsequent cases, the Ninth Circuit has explicitly acknowledged that an employer must, in its view, prove that the union has lost majority support in order to lawfully withdraw recognition:

> "In *Tahoe Nugget* and *Sahara-Tahoe* we stressed that the evidence presented to establish reasonable good faith doubt, individually or cumulatively, must unequivocally indicate that union support declined to a minority." *NLRB v. Silver Spur Casino*, 623 F.2d 571, 579 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

See also: *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 631 (9th Cir. 1983); *N. T. Enloe Memorial Hospital v. NLRB*, 682 F.2d 790 (9th Cir. 1982).

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7. The *Celanese* approach refers to the decision of the National Labor Relations Board in *Celanese Corp. of America*, 95 N.L.R.B. 664 (1951).

The *Tahoe Nugget* approach, as applied by the administrative law judge and the Sixth Circuit in this case, places the employer in an untenable position. Confronted with evidence that the incumbent union has lost majority support, the employer must choose between two equally undesirable alternatives. The employer can ignore that evidence, proceed to bargain with the incumbent union, and run the risk of committing an unfair labor practice by bargaining with a minority union that does not enjoy the majority support of its employees. *See International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961). Alternatively, it can attempt to prove that the union has lost majority status, and then withdraw recognition. But it is virtually impossible for the employer to do so. The only way for it to carry its burden is to question or poll employees on their attitude toward the incumbent union, which will almost invariably constitute an unfair labor practice. *See Bartenders, Hotel, Motel & Restaurant Employers Bargaining Assn.*, 213 N.L.R.B. 651, 657 (1974); *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1067 (1967).

Other circuits have fashioned a more sensible approach to this issue, recognizing that an employer can withdraw recognition from an incumbent union by proving *either* that the union no longer commands majority support *or* that the employer, in good faith, has reasonable grounds based upon objective considerations to doubt the union's continued majority status, and further recognizing that the two standards are, as the words suggest, truly separate and distinct. More importantly, the approach taken in these other circuits serves to protect the paramount Section 7 rights of employees "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157.

c. The Fifth, Seventh and Eighth Circuits

The analysis developed in other circuits carefully distinguishes the good-faith doubt test for withdrawal of recognition from the issue of actual majority status. In those circuits, the evidence presented by the employer is viewed in its entirety to determine whether it provides the basis for the employer's good-faith doubt. If so, the employer has carried its burden of rebutting the continued presumption of majority status of the incumbent union, and the burden then shifts to the General Counsel, and the charging party, the incumbent union, to establish that the union did, in fact, have majority support at the time recognition was withdrawn.

The leading case espousing this view, the facts of which have been said to not "materially differ" from those of *Tahoe Nugget*, is *Bellwood General Hospital, Inc. v. NLRB*, 627 F.2d 98 (7th Cir. 1980). *Id.* at 728 n.61. The employer in that case introduced several factors indicating that the union had lost majority support, including a 70% turnover rate among unit employees, statements by employees of dissatisfaction with the union, lack of properly elected union officers, low attendance at union meetings, failure of union officers to participate in negotiations for a collective bargaining agreement, and failure of the union to process grievances during the first contract.

Although confronted with evidence strikingly similar to that presented to the Ninth Circuit in *Tahoe Nugget* and to the Sixth Circuit in this case, the Seventh Circuit reached the opposite conclusion, holding that the employer had rebutted the continuing presumption of majority status by establishing that it had an objectively-based, good-faith doubt as to the majority status of the union. The burden then shifted to the General Counsel to prove that the union had actual majority support among the employees.

In contrast to the approach of *Tahoe Nugget*, the court observed that the objective evidence presented by the employer had to be viewed in its entirety, rather than individually analyzed in isolation and then ultimately rejected.

> "The Board, in its argument that the evidence confronting the Hospital was inadequate to justify a good faith doubt, relies upon a series of cases stating that the individual elements the Hospital relies upon, standing alone, are insufficient. [Citations omitted]. However, in doing so, the Board ignores the fact that Bohard and the Hospital had the sum total of many factors before them indicating a loss of the Union's majority status. . . . Case law establishes that it is the cumulative effect of all the evidence presented to the employer which is the relevant consideration, not each element considered separately. [Citations omitted]. Even were we to agree, therefore, that some of the individual elements might not, in themselves, justify a good faith doubt, or even that the sum total of the evidence might not support a finding that the Union had, in fact, lost its majority status, *see Hershey Chocolate Corp.*, 121 NLRB 901 (1958), we think the record without reasonable dispute indicates that the Hospital had sufficient objective evidence before it on which to base a reasonable doubt of the Union's continued majority support. The Hospital's presentation was sufficient, at least, to shift the burden to the General Counsel to establish the Union's majority. *Orion*, supra at 85. The General Counsel made no such showing." *Id.* at 103-04.

As the General Counsel failed to carry his burden, the Seventh Circuit denied enforcement of the Board's bargaining order.[8]

Under the Seventh Circuit's analysis, an employer is not required to affirmatively prove that the union has lost majority support as a prerequisite to withdrawing recognition:

> "Further, to rebut that presumption [of the union's continued majority status], the employer need not prove that the union no longer represents a majority of the employees, but only that at the time it refused to bargain there were sufficient objective considerations to support a reasonable doubt of the union's majority status." *Star Manufacturing Co. v. NLRB*, 536 F.2d 1192, 1195 (7th Cir. 1976).

The differences between the standards applied by the Seventh Circuit and those applied by the Sixth Circuit in this case and the Ninth Circuit in *Tahoe Nugget* and its progeny could not be more clear.

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8. *See also Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542 (7th Cir. 1970); *NLRB v. Laystrom Manufacturing Co.*, 359 F.2d 799 (7th Cir. 1966). In the *Ingress-Plastene* case, the Seventh Circuit criticized the Board's attack upon the objective factors cited by the employer in support of its good-faith doubt:

> "Although the Board attacks each of the reasons advanced by the company in support of its good faith doubt of the union's majority status, the company does not rely on any one reason alone, but rather on all as a whole. We think the entire record, including evidence against the Board's position as well as in favor of it, Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), supports the company's position. We note that the union's majority has never actually been asserted by the Board and, in fact, is in serious doubt from the record." 430 F.2d at 547.

The Seventh Circuit's criticism in *Ingress-Plastene* is equally applicable to the analysis of the administrative law judge and the Sixth Circuit in this case.

The Seventh Circuit's analysis was applied by the Eighth Circuit in *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974). The employer there claimed that a good-faith doubt as to the incumbent union's majority status had arisen as a result of the filing of a decertification petition by 30% of the employees, a decrease in union dues check-offs among the employees, substantial employee turnover, and resignations by 47 of 222 unit employees. Adopting "the reasoning of the Seventh Circuit," the Eighth Circuit held that the employer had established a good-faith doubt as to the union's majority status, shifting the burden to the General Counsel:

> "The law judge considered those elements seriatim and concluded that none of them individually would constitute a sufficient basis for a good faith refusal to bargain. While the Board's separate analyses are arguably supportable, when they are considered together we believe that good faith doubt has been demonstrated at least to the point of requiring the General Counsel to come forward with evidence that the union did represent a majority of the employees in the unit on the refusal to bargain date. This the General Counsel did not do." 494 F.2d at 194.

The court observed that "whether or not any one of the above factors would itself support an objective good faith doubt, it is not true that all reasons collectively would be insufficient." 494 F.2d at 195.

The Fifth Circuit is in accord with this approach. In *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), the employer introduced evidence that approximately one-third of the unit employees worked during all or part of the strike, that the strike had resulted in an approximately 25% turnover in the employer's work

force, that 19 of 177 unit employees resigned from the union during the strike, and that a union representative had stated that approximately 20% of the strikers would not be returning to work. Although unable to demonstrate conclusively that a majority of the employees no longer supported the union as the *Tahoe Nugget* court would require, the employer was held by the Fifth Circuit to have "made permissible inferences from solid evidence—the number of returning strikers, the Union resignations, the number of replacements, and the Union Representatives remark—which in our view were sufficient to support a reasonable doubt of the Union's continued majority status." 584 F.2d at 729. The Board's contrary decision was said to rest "on presumptions we deem inapplicable" and "on the rejection of inferences we consider permissible." *Id.* Absent evidence from the General Counsel that the Union did enjoy majority support, the court held that the employer had established a good-faith doubt as to the union's majority status and was permitted to withdraw recognition on that basis.

The obvious effect of the analysis adopted by the *Bellwood* court and the Fifth and Eighth Circuits is to place the burden of demonstrating actual majority status upon the General Counsel and the charging party, the incumbent union. The Board itself at one time recognized that this allocation is appropriate, since the union is in a much better position than an employer to prove majority support:

> "Proof of majority is peculiarly within the special competence of the union. It may be proved by signed authorization cards, dues checkoff cards, membership lists, or any other evidentiary means. An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's

> membership lists and direct interrogation of the employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit." *Stoner Rubber Co.*, 123 N.L.R.B. 1440 (1959).

The union enjoys an additional advantage in proving majority support. Unlike the employer, it is free to question employees concerning union sentiment. *See* R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 176 (1976).

By placing the burden to prove actual majority status upon the party best able to carry it, the *Bellwood* analysis protects the Section 7 rights of employees to select their own bargaining representatives. Under *Tahoe Nugget*, an employer faced with even substantial evidence raising a doubt as to the incumbent union's majority status is saddled with the hopeless burden of proving that the union has actually lost majority support among unit employees. The not unexpected result will be that, in most cases, the employer will continue to recognize and bargain with the union, even though a majority of the employees may not wish to be represented by that union.

Under *Bellwood*, persuasive objective evidence that the union has lost majority support is sufficient to shift the burden to the General Counsel and the incumbent union to prove that the union does enjoy majority support among the employees. While *Tahoe Nugget* plainly in-

fringes upon the employees' right to freedom of choice, the *Bellwood* analysis protects that right by requiring actual proof, from the only party practically able to furnish it, as to the preferences of the employees whose wishes are in dispute.

Since the imposition of a bargaining order after an employer has withdrawn recognition from a union has such important consequences for the employees' Section 7 rights, this Court must resolve the conflict among the circuits as to whether and when an employer may withdraw recognition from a declining union. In so doing, the Court should assure that, once a good-faith doubt has been established, no bargaining order should issue unless and until the General Counsel can prove that the employees, whose interests are at stake, continue to accord the incumbent union majority support.

2. There Is a Clear Split Between the Sixth Circuit and the District of Columbia Circuit As to the Propriety of a Bargaining Order When a Substantial Period of Time Has Passed Since the Withdrawal of Recognition

Even assuming, *arguendo*, that the Sixth Circuit properly concluded that Mobile Home's withdrawal of Union recognition was unlawful, an additional question arises as to whether the perfunctory entering of a bargaining order is appropriate. Faced with nearly identical evidence of delays in the Board's handling of claimed unfair labor practices resulting from a withdrawal of recognition, the District of Columbia Court of Appeals has refused to enforce the Board's usual bargaining order, and, instead, remanded the case to have the Board consider whether a new election might not be the best method to serve the objectives of the Act, including the protection of the Section 7 rights

of current employees to select their own bargaining representatives.

The events upon which this proceding is based occurred in *November and December, 1976.* Since that time, the Board's fumbling adjudication of the case has resulted in interminable delays, including an initial delay of some four years before a full and complete decision by an adminstrative law judge had been issued. Under these unusual procedural circumstances, involving unconscionable delays not attributable to the employer, it was incumbent on the Sixth Circuit to consider whether a bargaining order would best effectuate the purposes of the Act, i.e., the promotion of industrial stability while maximizing employee free choice. By perfunctorily approving a bargaining order in this case, the Sixth Circuit has maximized *union* stability at the expense of employee free choice.

It is undisputed that no employees remain from the original unit the Union was authorized to represent in 1972. In light of the employer's turnover rate, it is clear that the employee complement at the time the administrative law judge rendered his decision in 1981 was entirely different from the one that existed some four years earlier in December, 1976. Under these circumstances, the purposes of the Act are best served by an election order rather than a bargaining order.

In *Peoples Gas Systems, Inc. v. NLRB,* 629 F.2d 35 (D.C. Cir. 1980), the District of Columbia Court of Appeals considered a lengthy procedural history similar to the instant case. There the court found that an employer had improperly withdrawn recognition from an incumbent union, but refused to enforce the Board's bargaining order remedy, because an "extraordinary amount of time has elapsed since the initial refusal to bargain in the spring

of 1973, most of which can be attributed to the Board and this court." *Id.* at 47.

The court criticized the Board's automatic use of bargaining orders, observing that the Board's approach "apparently regarded the employees' wishes as of no consequence whatsoever in determining a remedy." *Id.* at 47. According to the court, "bargaining orders do not automatically flow from a refusal to bargain if it is not clear that the employees desire the Union as their representative." *Id.* The court concluded by remanding the case to the Board with instructions to assess the appropriateness of an election.

The differences in the reasoning and holdings in *Peoples Gas Systems* and the instant case are obvious. The unusually long span of time from Mobile Home's alleged violation to imposition of the bargaining order remedy, the good faith nature of its asserted doubt of a majority status, the probability of a substantial, if not complete, turnover of its work force with the result that a union is being thrust upon a group of employees, not one of whom has ever selected or supported it, and the lack of evidence that a free and fair election could not be held—all these factors militate against imposition of a bargaining order. The Sixth Circuit has failed to recognize that "[e]mployee Section 7 rights thus play an important role in the selection of a remedy." *Id.* at 49.

For these reasons, this Court should refuse enforcement of the Board's proposed bargaining order. The Court should reconcile the differences between the circuits and assure that, in fashioning a remedy for unlawful withdrawals of recognition, "the expressed wishes of the employees must be accorded a heavy weight in the balance." *Id.*

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit in this case exemplifies a sharp division among the circuits as to the standards governing the determination of and remedy for alleged unfair labor practices arising from employer withdrawals of recognition from an incumbent union. In determining the issues in this case, the Sixth Circuit has adopted an approach that significantly intrudes upon the fundamental Section 7 rights of employees to bargain through representatives of their own choosing.

The petition for a writ of certiorari should be granted to allow the Court the opportunity to establish a uniform approach for the National Labor Relations Board and Courts of Appeals to deal with these recurrent issues.

Respectfully submitted,

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